IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

CRL.A.No. 1949 of 2003()

SC.495/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANT: ACCUSED:

B. MADHAVAN, S/O. KRISHNAN,
KUBANAS VILLAGE, BEKKUR POST.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE:

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1. THE SUB INSPECTOR OF POLICE, KUMBLA.

2. STATE OF KERALA REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28.09.2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1949 OF 2003

Dated this the 28th day of September, 2007.

JUDGMENT

The appellant was charge sheeted by the Sub Inspector of Police, Kumbala, for an offence punishable under Section 55(a) of the Abkari Act on the allegation that he was found transporting and in possession of 24 bottles of Original Choice Delux Whisky, Indian made foreign liquor each containing 750 ml without any permit under the provisions of the Abkari Act and the Rules made thereunder. By the judgment dated 14th Novermber, 2003 in S.C.No.495/2000, the Additional Sessions Judge (Adhoc-I), Kasaragod found the appellant guilty of the offence charged against him and he was convicted under Section 55(a) of the Act and sentenced to undergo R.I for three and a half years and to pay a fine of Rs. One lakh, with default sentence of payment of fine, to undergo R.I for a further term of three months. The above judgment of the trial court is assailed in this appeal.

2. The counsel appearing for the appellant had raised three contentions in challenging the findings entered and conviction ordered

against the appellant. Firstly, the counsel submits that in the light of the principles laid down by this Court in **Surendran v. Excise Inspector** (2004(1) KLT 404) and in **Sudephan @ Aniyan v. State of Kerala** (2005 (2) KLD (Crl) 631), the conviction entered against the appellant under Section 55(a) is not legally sustainable. Secondly, it is submitted that the evidence of Pws 1 and 3, who are the police officials, would not prove that the appellant was found in possession of 24 bottles of Indian made foreign liquor as alleged by the prosecution as the only independent witness examined in the case, PW2, did not support the prosecution case. Thirdly, it is submitted that even if the evidence of PWs 1 and 3, Ext.P1 seizure mahazar, Ext.P4 forwarding note, Ext.P5 chemical report have been considered, the prosecution could not succeed in proving that the appellant had committed any offence under the provisions of the Act.

3. Before considering the contentions raised by the learned counsel appearing for the appellant, this Court has to look into the evidence of Pws 1 and 3. PW3 was the Sub Inspector of Police, Kumbala Police Station, who had given evidence before the court that on 9.10.1999 at about 7.10 p.m himself and other police officials including PW1 were on patrol duty and when they reached near the

Government School at Mangalapady, it was noted that the appellant was standing in a bus stop holding a plastic sack in his hand and on seeing the police party, the appellant tumbled and tried to escape. However, the appellant was waylaid and questioned and on questioning, it was revealed that the sack which the appellant was holding contained 24 bottles of Indian made foreign liquor each containing 750 ml and the appellant was not having any authority to transport or keep the same. PW3 further had stated that on preparing Ext.P1 mahazar, 24 bottles of Original Choice Delux Whisky were seized and two bottles were taken for sampling and labellings in the presence of the witnesses. The evidence of this witness would further show that the appellant was arrested and produced before the court on the next day and on completion of the investigation, final charge has been laid against the appellant. It was also revealed as per Ext.P5 chemical report that the sample analysed reported as Indian made foreign liquor and contained 42.67% and 42.94% ethyl alcohol by volume respectively in the two bottles. The evidence of PW3 is corroborated by that of the evidence of PW1, who accompanied PW3 at the time of detection of the crime. The trial court, after considering the evidence of these two witnesses, found that the prosecution is succeeded in proving

that the appellant was found in possession of 24 bottles of Indian made foreign liquor without any authority under the provisions of the Abkari Act and Rules.

4. The question to be considered in this appeal in the light of the contentions raised by the counsel appearing for the appellant is that whether the finding of the court that the appellant had committed the offence under Section 55(a)(of the Abkari Act is justifiable or not; As per the principles laid down by this Court in **Surendran's** case (cited supra), this Court had categorically held that to attract an offence under Section 55(a) of the Act, the prosecution should allege and prove that the possession of any contraband article or liquor is in connection with any import or export or transit of the same. The evidence of PWs 1 and 3 would also only show that when they were on patrol duty on the day of the incident, they found the appellant standing at the bus stop with a plastic sack which contained the contraband article. There was no evidence against the appellant that the contraband alleged to have been seized from the appellant was transported from any other State to Kerala or even transporting from one State to another within the State and the possession is in connection with any such import or export or transit. If so, applying

the principles laid down by this Court, the finding of the trial court that the appellant had committed an offence under Section 55(a) of the Act, is not legally sustainable. Hence, the conviction and sentence ordered against the appellant stand set aside.

5. The next question to be considered is whether the evidence of Pws 1 and 3 can be accepted for the seizure of 24 bottles of Indian made foreign liquor without any license or authority under the provisions of the Act. The criticism against these witnesses is that they are police officials and their evidence is not corroborated by any independent evidence as PW2, the only independent witness examined, turned hostile to the prosecution. As per the provisions of the Abkari Act, there is no legal bar or objection to prove an offence under the provisions of the Act only on the basis of the investigating officers or the excise officials, if their evidence is otherwise acceptable and free from any doubt. In this context, the trial court found that the evidence of PWs1 and 3 is acceptable and their evidence is not shattered by the defence for creating any doubt. In this context, though the counsel appearing for the appellant submits that there is no proper explanation for the delay in producing the sample and the contraband before the court, it is seen that the

same were produced as per the evidence of PW3 only on 2.11.1999. Further it was alleged that there is no evidence before the court that the contraband and the sample were kept in safe custody till the same were produced before the court. In this context, this Court had perused Ext.P4 forwarding note and Ext.P1 mahazar. These two documents would clearly indicate that the contraband article seized from the appellant were produced in the court and the short delay occurred in giving Ext.P4 forwarding note would not create any doubt in the evidence of these witnesses. Apart from that, the trial court considered the fact that as per Ext.P5 chemical report, it was reported that the sample sent from the court for analysis has been analysed by the chemical analyst and it was reported that the sample contained ethyl alcohol. In the above circumstances, this Court see that there is no infirmity with the evidence of Pws 1 and 3. Hence, it is proved by the prosecution that the appellant was found in possession of 24 bottles of Indian made foreign liquor on the date of the incident without any authority.

6. The next question to be considered is that as the evidence of Pws 1 and 3 has been accepted by this Court, what would be the offence committed by the appellant. In this context, the learned

Public Prosecutor appearing for the State submits that if the evidence of Pws 1 and 3 is accepted, it would show that the appellant was found in possession of Indian made foreign liquor in excess of the quantity to be possessed by a person as per the provisions of the Abkari Act and as per the provisions of the Foreign Liquor rules. In this context, it has to be noted that as per Rule 11 of Foreign Liquor Rules, no quantity of foreign liquor in excess of quantity notified by the Government under Sections 10 and 13 of the Act shall be transported from one place to another within the State unless the same is covered by a transport permit issued by the Excise Inspector in charge of the Range of Origin. Further as per the last proviso to subrule, it is stated that a person can transport a quantity of foreign liquor not exceeding the quantity notified by the Government under Sections 10 and 13 or the Act without a transport permit issued by the authority concerned. Further, as per Rule 11A of the Rules provide that no quantity of foreign liquor exceeding the quantity as notified by Government under Sections 10 and 13 shall be possessed or stored by any person within the State unless the same is covered by a permit issued by an officer to do so. The proviso to the same Rule further provides that a person can possess or store within the State a quantity of foreign liquor not exceeding

the quantity notified by the Government under Sections 10 and 13 of the Act without a permit issued by the concerned authority. In the light of the above restrictions in the Foreign Liquor Rules, it can be seen that a person in the State can transport or possess foreign liquor in exceeding the quantity permitted by the Government as per the notification issued under Sections 10 and 13 of the Act. If any violation of the said Rules, it will constitute an offence punishable under Section 63 of the Abkari Act. Section 63 of the Act reads as follows:

> "For offences not otherwise provided for:- Whoever is guilty of any act or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such wilful act or omission with fine (which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both)".

7. In the above circumstances, this Court is of the view that except the evidence of Pws 1 and 3, it can be held that the prosecution is succeeded in proving that the appellant had committed an offence punishable under Section 63 of the Act. Hence, this Court also find that the appellant had committed an offence punishable under

Section 63 of the Act.

8. The next question to be considered is with regard to the sentence to be awarded against the appellant. In this context, this Court notice that the incident had occurred in the year 1999 and the prosecution had not proved that the appellant was engaged in selling or importing or transporting the contraband from outside the State. Further, it is admitted by PW3 that foreign Liquors are available in the State.

9. Considering all these circumstances, this Court is of the view that a penalty of Rs.3,000/= as fine under Section 63 of the Act will meet the ends of justice. Accordingly the appellant is found guilty under Section 63 of the Act and he was convicted thereunder and sentenced to pay a fine of Rs.3,000/= with default sentence of payment of fine, to undergo S.I for six months.

With the above directions, the appeal is allowed in part. It is made clear that the bail bonds executed by the appellant shall stand cancelled.

K. THANKAPPAN, JUDGE.

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